Case No. 10-17198

In the United States Court of Appeal
For the Ninth Circuit

RON DUDUM, *et al.*,
Plaintiffs and Appellants,

v.

JOHN ARNTZ, *et al.*,
Defendants and Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the United States District Court
for the Northern District of California
The Honorable Richard Seeborg, Presiding
District Court Case No. 3:10-cv-00504-RS

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CORPORATE DISCLOSURE STATEMENT

FED. R. APP. PROC. 26.1

No Appellant herein is a corporation.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

I. INTRODUCTION 1

II. JURISDICTIONAL STATEMENT 6

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW 6

IV. STATEMENT OF THE CASE 9

V. STATEMENT OF FACTS 9

A. HOW RESTRICTED INSTANT RUNOFF VOTING IS CONDUCTED IN SAN FRANCISCO 10

B. THOUSANDS OF VOTERS' BALLOTS HAVE BEEN INVOLUNTARILY "EXHAUSTED," BARRING THOSE VOTERS FROM HAVING ANY VOTE COUNTED IN DECISIVE INSTANT RUNOFF ROUNDS WHERE THE WINNER IS DECIDED 12

C. UNDER RESTRICTED IRV, THOUSANDS OF SAN FRANCISCO VOTERS WILL BE DEPRIVED OF THE RIGHT TO VOTE IN DISPOSITIVE ROUNDS OF FUTURE ELECTIONS, INCLUDING THE 2011 MAYORAL ELECTION 18

D. ALTERNATIVES TO RESTRICTED IRV ALREADY EXIST: CONSTITUTIONAL ELECTION SYSTEMS COULD EASILY BE IMPLEMENTED IN SAN FRANCISCO AND ARE CURRENTLY BEING USED BY THE CITY 19

VI. SUMMARY OF ARGUMENT 21

VII. STANDARD OF REVIEW 23

VIII. ARGUMENT 24

A. RESTRICTED INSTANT RUNOFF VOTING VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS 24

1. Strict Scrutiny Governs This Case 25

a. Restricted IRV unconstitutionally *denies* substantial numbers of voters the right to have a vote counted in dispositive instant runoffs 27

i. Stripping away its hi-tech trappings, Instant Runoff Voting is the functional equivalent of a series of elections 29

ii. By denying some voters the ability to have a vote counted in the dispositive instant runoff election, Restricted IRV severely burdens the right to vote 34

b. Even if Instant Runoff Voting is characterized as a single election, strict scrutiny still applies because some voters' votes are *diluted* by the ability of other voters to have more votes counted 39

c. Restricted IRV fails strict scrutiny because it is not narrowly-tailored to serve a compelling state interest 44

i. Restricted IRV does not serve the interest in electing City officers by majority vote 46

ii. Restricted IRV does not serve the interest of having City officials elected when turnout is (supposedly) highest 46

iii. There is no record evidence that Restricted IRV reduces "negative campaigning," and that is not a legitimate interest anyway 48

iv. Reducing costs is not a compelling interest that justifies infringing voting rights 49

v. Restricted IRV is not narrowly-tailored 49

2. Restricted IRV Is Also Unconstitutional Under The Intermediate Level Of Scrutiny Prescribed By *Anderson v. Celebrezze*, *Burdick v. Takushi* And *Crawford v. Marion County* 53

B. RESTRICTED IRV VIOLATES DUE PROCESS 62

C. THE VOTERS ARE ENTITLED TO A PERMANENT INJUNCTION AND DECLARATORY JUDGMENT AGAINST THE CONTINUED USE OF RESTRICTED IRV 64

IX. CONCLUSION 66

STATEMENT RE RELATED CASES (Circuit Rule 28-2.6)..... 67

CERTIFICATE OF COMPLIANCE..... 68

PROOF OF SERVICE 69

SAN FRANCISCO CHARTER § 13.102 (Instant Runoff Voting) ..... Exhibit A

TABLE OF AUTHORITIES

Page

CASES

ACLU of N.M. v. Santillanes,
546 F.3d 1313 (10th Cir. 2008)..... 56

ACLU v. Lomax,
471 F.3d 1010 (9th Cir. 2006)..... 25

Anderson v. Celebrezze,
460 U.S. 780 (1983).....*passim*

Ariz. Right to Life PAC v. Bayless,
320 F.3d 1002 (9th Cir. 2003) 48, 59

Ayers-Schaffner v. Distefano,
37 F.3d 726 (1st Cir. 1994).....*passim*

Bd. of Est. v. Morris,
489 U.S. 688 (1989) 41

Bennett v. Yoshina,
140 F.3d 1218 (9th Cir. 1998) 62

Bonas v. Town of N. Smithfield,
265 F.3d 69 (1st Cir. 2001) 62

Burdick v. Takushi,
504 U.S. 428 (1991) .....*passim*

Bush v. Gore,
531 U.S. 98 (2000).....41, 63

Cal. Pro-Life Council, Inc. v. Randolph,
507 F.3d 1172 (9th Cir. 2007)..... 44

Cardona v. Oakland Unif. Sch. Dist.,
785 F. Supp. 837 (N.D. Cal. 1992)..... 64, 65

Caruso v. Yamhill County,
422 F.3d 848 (9th Cir. 2005),
cert. denied sub nom., Caruso v. Oregon, 126 S. Ct. 1786 (2006) 62

Crawford v. Marion County Elec. Bd.,
553 U.S. 181 (2008) .....*passim*

Duncan v. Poythress,
657 F.2d 691 (5th Cir. 1981),
cert. dismissed, 459 U.S. 1012 (1982) 62

Dunn v. Blumstein,
405 U.S. 330 (1972) 24, 25

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006) 64

Estill v. Cool,
320 Fed. Appx. 309 (6th Cir. 2008),
cert. den., 129 S. Ct. 1988 (U.S. 2009) 38

Fed. Elec. Comm'n v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) 49

Green Party v. Garfield,
648 F. Supp. 2d 298 (D. Conn. 2009),
aff'd in part and rev'd in part on other grounds,
616 F.3d 189 (2d Cir. 2010) 45

Green v. City of Tucson,
340 F.3d 891 (9th Cir. 2003)..... 23, 25

Griffin v. Burns,
570 F.2d 1065 (1st Cir. 1978)..... 23, 63

Harper v. Virginia State Board of Elections,
383 U.S. 663 (1965) 49

Hussey v. City of Portland,
64 F.3d 1260 (9th Cir. 1995),
cert. denied, 516 U.S. 1112 (1996)..... 38, 39

In re Lance W.,
37 Cal. 3d 873 (1985) 30

In re Smith,
323 F. Supp. 1082 (Bankr. D. Colo. 1971) 49

Johnson v. Miller,
929 F. Supp. 1529 (S.D. Ga. 1996),
aff'd sub nom., Abrams v. Johnson, 521 U.S. 74 (1997) 50

Kramer v. Union Free School Dist.,
395 U.S. 621 (1969) 25

LaRouche v. Fowler,
152 F.3d 974 (D.C. Cir. 1998) 25

League of Women Voters v. Brunner,
548 F.3d 463 (6th Cir. 2008) 63

Lemons v. Bradbury,
538 F.3d 1098 (9th Cir. 2008) 21, 22, 25

Lubin v. Panish,
415 U.S. 709 (1974) 61

McSweeney v. City of Cambridge,
665 N.E.2d 11 (Mass. 1996) 28

Minn. Voters Alliance v. City of Minneapolis,
766 N.W.2d 683 (Minn. 2009) ..... *passim*

Montana Chamber of Commerce v. Argenbright,
226 F.3d 1049 (9th Cir. 2000) 62

Moore v. Election Comm'rs of Cambridge,
35 N.E.2d 222 (Mass. 1941) 28

Nader v. Brewer,
531 F.3d 1028 (9th Cir. 2008) 25

Northeast Ohio Coalition for the Homeless v. Blackwell,
467 F.3d 999 (6th Cir. 2006) 65

Partnoy v. Shelley,
277 F. Supp. 2d 1064 (S.D. Cal. 2003) 24, 36, 37, 44

People ex. rel. Devine v. Elkus,
59 Cal. App. 396 (1922) 34

Porter v. Bowen,
496 F.3d 1009 (9th Cir. 2007)..... 23, 53

Prete v. Bradbury,
438 F.3d 949 (9th Cir. 2006) 30

Price v. N.Y. State Bd. of Elections,
540 F.3d 101 (2d Cir. 2008) 55

Reynolds v. Sims,
377 U.S. 533 (1964).....*passim*

Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2010) 64

Steffel v. Thompson,
415 U.S. 452 (1972) 64

Stephenson v. Ann Arbor Bd. of Canvassers,
No. 75-10166 AW (Mich. Cir. Ct. 1975) 28

Storer v. Brown,
415 U.S. 724 (1972) 34, 54

Tashjian v. Republican Party,
479 U.S. 208 (1986)..... 49

Terry v. Adams,
345 U.S. 461 (1953)..... 34

Turner v. Dierks Sch. Dist.,
782 F. Supp. 81 (W.D. Ark. 1992).....41

United States v. Va.,
518 U.S. 515 (1996) 45, 51

STATUTES

28 U.S.C. § 1291 6

28 U.S.C. § 1331 6

42 U.S.C. § 1983 6

CAL. ELEC. CODE § 1300 ..... 47, 51

CAL. ELEC. CODE § 11382 36

CONSTITUTIONAL AUTHORITIES

U.S. CONSTITUTION

First Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

OTHER AUTHORITIES

FED. R. APP. PROC. 4(a)(1)(A) 6

FairVote.org, *How Instant Runoff Voting Works*, online at http://www.fairvote.org/how-instant-runoff-voting-works 30

FairVote.org, *New to IRV?: Frequently Asked Questions*, online at http://www.fairvote.org/New-to-IRV 30, 44

S.F. CHARTER § 13.102 ..... *passim*

S.F. CHARTER § 13.102(i) 50, 59

S.F. CHARTER § 13.102(a)(3) ..... *passim*

S.F. CHARTER § 13.102(b) 10

S.F. CHARTER § 13.102(c) 16

S.F. CHARTER § 13.102(d) 11, 12

S.F. CHARTER § 13.102(e) 11, 15, 42

I.

INTRODUCTION

Appellants (hereinafter "Voters") were plaintiffs below and are residents and registered voters in the City and County of San Francisco. Voters assert San Francisco's restricted instant runoff voting system violates the First and Fourteenth Amendments, because it has barred tens of thousands of voters from having any vote counted in decisive "instant runoff" rounds where the winning candidate is determined.

Prior to 2004, just a few jurisdictions nationally used *un*restricted instant runoff voting,[1] which employs computer technology to mimic conventional general/runoff elections. *Un*restricted instant runoff voting systems permit voters to vote for, or rank, each candidate running for a given office in order of preference. The first-place votes are tallied. If no candidate receives a majority of the votes cast, "instant runoffs" follow: the candidate with the lowest number of first-place votes is eliminated, and each vote cast for that candidate is redistributed to the voters' second-choice candidates and all votes re-tabulated. The process of elimination and redistribution continues, runoff by runoff, until one candidate receives 50%+1 of all votes cast.

[1] Sometimes called "ranked choice" voting.

San Francisco's instant runoff voting system was adopted by the voters in 2002 and first implemented in November 2004. It includes an unorthodox component that was previously used nowhere else in this country: a voter is allowed to rank only three candidates for a particular office, regardless of the number candidates running. (*See* Exhibits of Record, filed herewith [hereafter "ER"] at pp. 0535-0536.)[2]

Once the three candidates ranked by a voter are eliminated, the voter's ballot is declared to be "exhausted," and shall "*not be counted* in further stages of the tabulation . . . ." S.F. CHARTER § 13.102(a)(3) (emphasis added).[3] Hence it is a *restricted* instant runoff voting system.

It is undisputed that San Francisco's restrictive variant of instant runoff voting routinely prevents thousands of voters from having any vote counted in the decisive instant runoff round in which the winning candidate is elected. Voters challenge this as unconstitutional vote deprivation.

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[2] Aspen (CO), Pierce County (WA), and Minneapolis (MN) adopted restricted instant runoff voting in 2006 and 2007. (ER0622-0623.) After running two Restricted IRV elections, Pierce County voters repealed instant runoff voting in November 2009; Aspen voters voted to repeal it twice: in a 2009 advisory vote, and a 2010 binding vote. (ER0623.) Minneapolis conducted its first restricted instant runoff election in November 2009. (*Id*.) Three other Bay Area cities—Oakland, Berkeley, and San Leandro—implemented Restricted IRV for the first time in November 2010. (*Id*.)

[3] S.F. CHARTER § 13.102 is attached as an Exhibit hereto.

San Francisco defended its restricted instant runoff voting system below by arguing it has the authority to experiment with different forms of voting, and that the City is actually doing the voters a favor by giving them three ranked choices, or votes, instead of just one. But the ability to experiment does not trump the right to vote, which our Constitution holds in the highest esteem.

And the City's claim that it is giving voters three votes instead of one conveniently ignores the fact that thousands of voters are denied any vote whatsoever at the most critical juncture of any election—the decisive instant runoff where the winner is decided. As will be demonstrated, San Francisco's restricted instant runoff scheme is an illegal, "3-strikes-and-you're-out" voting system.

The actual workings and impacts of restricted instant runoff voting are made more difficult to discern by computer technology, but the following example strips away the technological cloud and reveals the system's disenfranchising effect: County X enacts an experimental voting system where, instead of "instant" runoffs processed by computers, there are "quick" runoffs held a week apart. In each round the candidate with the fewest votes is eliminated, and his (and only his) voters are allowed to vote for a new candidate in the next runoff, subject to the restriction that once a

voter has voted for three different eliminated candidates he or she is precluded from voting again. Voters who vote for non-eliminated candidates must continue to vote for the same candidate in each round. The system would work as follows:

> General election: There is a general election in which 7 mayoral candidates are on the ballot—Candidates A, B, C, D, E, F & G. Each voter casts a single vote for the candidate of his or her choice. The votes are tabulated, no candidate gets a majority, and the system eliminates Candidate G from the race as she receives the fewest votes.
>
> Quick Runoff, Round One: One week later the first runoff election is held; only those who voted in the prior election can vote; each voter who previously voted for Candidate G can now vote for any remaining candidate, but every other voter must vote the same way s/he voted previously. Again no candidate receives a majority, and again the candidate who received the fewest votes, Candidate F, is eliminated.
>
> Quick Runoff, Round Two: One week later the second runoff election is held; only those who voted previously can vote; each voter who previously voted for Candidate F can now vote for any remaining candidate, but no other voter can change his or her prior vote. Again no candidate receives a majority, and again the candidate who received the fewest votes, Candidate E, is eliminated.
>
> Quick Runoff, Round Three: One week later the third runoff election is held; only those who voted previously can vote; each voter who previously voted for Candidate E can now vote for any remaining candidate, with one important exception: *if that voter also previously voted for Candidates F & G, she is barred from voting in this or any further runoff round. In other words, three strikes and they are out.*

Even though (as argued by the City below) voters are permitted to rank three candidates, that does not remedy the disenfranchisement—where thousands of voters are regularly barred from having a vote counted when it really matters—in the decisive runoff round. If this seems arbitrary, that's because it is: this example illustrates exactly how San Francisco's restricted instant runoff voting system works—the only difference, one with no constitutional significance, is that San Francisco requires voters to choose their three ranked candidates at the same time, whereas County X requires them to do so a week apart.

The disenfranchisement of thousands of San Francisco voters has occurred repeatedly in past elections and is certain to occur in future elections, including the November 2011 Mayoral election, absent relief from this Court.[4] Voters request that this Court find San Francisco's restricted instant runoff voting system unconstitutional, as applied and on its face.

[4] Below, the Voters sought to enjoin the use of Restricted IRV in the November 2010 supervisorial elections; the district court, however, denied Voters' injunction requests, which as a practical matter allowed those elections to proceed. In an effort to obtain a ruling on appeal before the Mayoral election, Voters moved to expedite this appeal, which motion was granted.

II.

JURISDICTIONAL STATEMENT

This lawsuit alleges violation of the Voters' rights under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Accordingly, the district court had federal question jurisdiction under 28 U.S.C. § 1331.

This appeal is from an order denying the Voters' motion for summary judgment and granting summary judgment to Defendants, and of the final judgment entered pursuant thereto on September 9, 2010. That order and judgment disposed of all parties' claims, and this Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

The appeal was timely filed on September 29, 2010, twenty days after judgment was entered. *See* FED. R. APP. PROC. 4(a)(1)(A) (civil appeal must be filed "within 30 days after the judgment or order appealed from is entered.").

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

For years San Francisco used two types of conventional voting systems for city offices. For many city offices, there was a general election,

and if no candidate received a majority of votes cast, there would ensue a runoff between the top two vote-getters ("general/runoff system"). For other city offices, there was a general election in which the candidate receiving the most votes was the declared the winner, even if she or he did not receive a majority of the votes cast ("plurality system").

In 2004, San Francisco implemented a previously-untried and restrictive form of instant runoff voting for elections to some city offices, in which voters are allowed to rank only their first, second and third-choice candidates for a given office, even though there often are more than three candidates on the ballot and running for that office. The election then proceeds, round by round, until one candidate receives what is deemed to be a majority. The last-place finisher in each round of tabulation is eliminated and the vote of any voter who voted for an eliminated candidate is switched to his or her next ranked candidate, and all votes are re-tabulated. Once a voter's three ranked candidates are eliminated, the voter's ballot is "exhausted" and she or he is barred from having a vote counted in further rounds of tabulation, including the decisive instant runoff round where the winner is determined.

The three-choice limit, in elections where more than three candidates are running for a particular office, regularly results in thousands of voters

being barred from having any vote counted in decisive instant runoff rounds. By way of example: 1,429 voters ranked three different candidates but still had no vote counted in the decisive instant runoff round for the office of District 1 supervisor in November 2008. 2,128 voters had no vote counted in the decisive instant runoff round for District 11 supervisor in November 2008. 827 voters had no vote counted in the decisive instant runoff round for District 4 supervisor in November 2006. 4,237 voters had no vote counted in the decisive instant runoff round for District 7 supervisor in November 2004. And *5,693* voters had no vote counted in the decisive instant runoff round for District 5 supervisor in November 2004.[5]

The principal issue presented by this appeal is whether San Francisco's restricted instant runoff system violates the right to vote protected by the First and Fourteenth Amendments to the United States Constitution, either as applied or facially.

[5] ER0668-0670 (Stipulated Facts).

IV.

STATEMENT OF THE CASE

The Voters filed this action on February 4, 2010, and simultaneously moved for a preliminary injunction, seeking to bar the use of restricted instant runoff voting in San Francisco's November 2010 elections. The district court denied the Voters' motion on April 16, 2010.

The parties conducted discovery on an expedited basis and filed cross-motions for summary judgment, which were heard on August 26. The district court denied the Voters' summary judgment motion, and granted Defendants' cross-motion, on September 9. This appeal follows.

The Voters filed a motion to expedite this appeal per Circuit Rule 27-12, which was granted on October 14, 2010.

V.

STATEMENT OF FACTS

San Francisco voters approved a Charter amendment (Proposition A) in March 2002 that authorized instant runoff voting for certain municipal

elections.[6] Proposition A authorized voters to rank as many candidates as ran for a given office.[7]

Proposition A, however, also empowered the San Francisco Director of Elections to limit voters' choices to no fewer than three if the City's voting equipment "cannot feasibly accommodate choices equal to the total number of candidates running for each office[.]"[8] Based on this provision, the Director of Elections has limited the number of candidates that voters may rank to three in every election since.[9] This form of instant runoff voting, in which voters are allowed to rank only three candidates regardless of the number of candidates running for a particular office, is referred to hereafter as Restricted Instant Runoff Voting or "Restricted IRV."

A. HOW RESTRICTED INSTANT RUNOFF VOTING IS CONDUCTED IN SAN FRANCISCO.

San Francisco uses Restricted IRV to elect its Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and Supervisors. As discussed in more detail below, Restricted IRV is not

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[6] ER0674-0684, 0773-0786.

[7] S.F. CHARTER § 13.102(b) (voters can "rank a number of choices in order of preference equal to the total number of candidates for each office.").

[8] *Id*.

[9] ER0535-0536.

used for other elections in the City, and the City's existing elections equipment is regularly used for non-IRV elections.[10]

Under Restricted IRV, each voter is allowed to rank up to three candidates per office: a first, a second, and a third choice (assuming at least three candidates run). If there are more than three candidates on the ballot for an office (which is common), a voter is still allowed only to rank three choices.[11]

After ballots are cast, the votes are tabulated. If a candidate receives a majority of the first-place votes cast, he or she is elected.

If no candidate receives a majority of the first-place votes, one or more instant runoffs follow. The candidate who received the fewest first-place votes is eliminated, and each vote for that candidate is transferred to and counted for the voter's second-choice candidate. All other voters' first-place votes are re-counted as such.[12] The votes are then re-tabulated in the first "instant runoff round," *i.e.*, the second round of voting and tabulation.[13]

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[10] ER0599, 0679.

[11] ER0535-0536; S.F. CHARTER § 13.102.

[12] If the combined votes for the bottom two (or more) candidates are less than the number of votes for the next lowest candidate, more than one can be eliminated in a single round. S.F. CHARTER § 13.102(e).

[13] S.F. CHARTER § 13.102(d).

If no candidate receives a majority of the votes cast in the second round, the candidate in last place is again eliminated, and each vote for that candidate is transferred to and counted for the next-ranked candidate on that voter's ballot (*i.e.*, the voter's second or potentially third choice).[14]

This process continues, instant runoff after instant runoff. When one candidate gets a majority of the votes counted in a particular runoff round, he or she is declared the winner.

A ballot is declared to be "exhausted" when a voter's three ranked choices have been eliminated. The voter of an "exhausted" ballot is barred from having any vote counted in subsequent instant runoff rounds.

B. THOUSANDS OF VOTERS' BALLOTS HAVE BEEN INVOLUNTARILY "EXHAUSTED," BARRING THOSE VOTERS FROM HAVING ANY VOTE COUNTED IN DECISIVE INSTANT RUNOFF ROUNDS WHERE THE WINNER IS DECIDED.

The City Charter expressly requires that a voter's "ballot shall be deemed 'exhausted,' ***and not counted*** in further stages of the tabulation, if all of the choices have been eliminated . . . ." S.F. CHARTER § 13.102(a)(3) (emphasis added). San Francisco's Director of Elections agrees that once a voter's three choices have been eliminated, he or she has no vote counted in subsequent instant runoff rounds:

> Q. . . . . Referring back to [S.F. Charter § 13.102] (a)(3) there, isn't it true that a voter whose third [place]

[14] *Id.*

> choice is eliminated, does not have a ballot counted in subsequent rounds of tabulation?
> . . .
> A. Well, the ballot was counted, you know, I mean as far as the contest is concerned. So if the person's—*if the selection on that person's ballot are no longer in the contest, then certainly that—that ballot is no longer a part of the counting process.*
> ***Q. So in those subsequent rounds, it's not counted?***
> ***A. Correct. Right.***[15]

Restricted IRV was first implemented in the November 2004 San Francisco supervisorial elections. In the ten supervisorial elections between 2004 and 2008 where Restricted IRV has come into play (*i.e.*, where no candidate was elected in the first round), it is undisputed that tens of thousands of voters have had their ballots "exhausted" and had no vote counted in the decisive runoff rounds where the winner was decided.[16] This has been a severe and recurring problem.

In the 2004 race for District 5 supervisor, 22 candidates were on the ballot. There were 5,693 ballots on which a voter ranked three different candidates, but had his or her ballot exhausted before the final and decisive instant runoff round.[17] These "exhausted" ballots comprised 16.2% of all ballots cast. The winning candidate was determined in the 19th round of

[15] ER0554-0555 (emphasis added).
[16] ER0668-70 (Stipulated Facts).
[17] ER0650 & 0668A.

tabulation, and his margin of victory was only 311 votes.[18] The number of ballots involuntarily exhausted was more than *18 times* the margin of victory.[19]

Also in 2004, 13 candidates were on the ballot for District 7 supervisor. There were 4,237 ballots on which a voter ranked three different candidates, but had his or her ballot exhausted before the decisive instant runoff round. These exhausted ballots comprised 13.4% of all ballots cast. The winning candidate was determined in the 11th round of tabulation, and his margin of victory was 3,343 votes, nearly 1,000 votes less than the number of ballots involuntarily exhausted.[20]

In the 2006 race for District 4 supervisor, six candidates were on the ballot. There were 827 ballots on which a voter ranked three different candidates, but had his or her ballot exhausted before the decisive instant runoff round. These "exhausted" ballots comprised 4% of all ballots cast. The winning candidate was determined in the fourth round of tabulation,

[18] ER0329-0330.

[19] These numbers exclude "voluntarily" exhausted ballots, *i.e.*, ballots on which the voter chose not to rank the maximum number of candidates permitted.

[20] ER0331, 0650 & 0668A.

and his margin of victory was 801 votes–again, less than the number of involuntarily exhausted ballots.[21]

In the 2008 supervisor election in District 1, nine candidates were on the ballot. There were 1,429 ballots on which a voter ranked three different candidates, but had his or her ballot exhausted before the decisive instant runoff round. These exhausted ballots comprised 5% of all ballots cast. The winning candidate was determined in the second round of tabulation,[22] and his margin of victory was 347 votes. The number of involuntarily exhausted ballots was more than four times the margin of victory.[23]

Also in the 2008 supervisor election in District 11, nine candidates were on the ballot. There were 2,128 ballots involuntarily exhausted due to Restricted IRV—8.6% of all ballots cast. The winning candidate was determined in the fourth and final instant runoff round, and his margin of victory was 1,033 votes. The number of involuntarily exhausted ballots was more than double the margin of victory.[24]

Restricted IRV has involuntarily exhausted thousands of ballots in ten supervisorial elections between 2004 and 2008. As detailed above, five of

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[21] ER0333, 0650 & 0668A.

[22] Seven candidates were eliminated in the first round per S.F. Charter § 13.102(e). *See* note 12, *supra*.

[23] ER0335-0336, 0650 & 0669.

[24] ER0341, 0650 & 0669.

those elections were decided by a margin of victory smaller than the number of voters whose ballots were exhausted and could not vote in the decisive instant runoff round when the winner was elected.[25]

Another illustration of the severe impact of Restricted IRV is that candidates are routinely elected with less than a majority of the total votes cast. Although the Charter purportedly requires a candidate to be elected by "majority" vote, there is a catch: pursuant to S.F. CHARTER § 13.102(c), exhausted ballots are not included in the vote total for purposes of determining the number of votes necessary to attain a majority. For example, in 2008 there were 24,673 valid ballots cast for District 11 supervisor, yet the declared winner received only 10,225 votes or 41%.[26] Similarly, in 2006 there were 19,814 valid ballots cast for District 4 supervisor,[27] but the winner received only 8,388 votes—42.3% of the total ballots cast.[28] In 2004 the District 1 winner was elected with only a plurality of the votes cast as well.[29] And in 2004 the winner for District 5 supervisor received 13,211 votes in the final (19th) instant runoff; that was a

[25] ER0327-0341, 0650 & 0668-0670.
[26] ER0341, 0523-0525, 0559.
[27] ER0557-0558.
[28] ER0333, 0557-0558.
[29] ER0556-0557.

majority of the 26,111 non-exhausted ballots, but only 37.6% of the 35,109 total votes cast.[30]

San Francisco's Restricted IRV system was analyzed by nationally-respected voting rights expert Jonathan D. Katz, Ph.D, co-director of the Caltech/MIT Voting Technology Project.[31] Dr. Katz concluded:

- San Francisco's use of a Restricted Instant Runoff Voting system, where individuals are permitted to rank at most three candidates, limits the ability of some voters to equally participate in elections and regularly disenfranchises some voters.
- The use of Restricted IRV prevents voters from having their vote counted in the dispositive round.
- This impact falls disproportionately on voters who prefer less-popular candidates.[32]

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[30] ER0329-0330, 0556-0557.

[31] Dr. Katz is a political science professor and dean at Caltech and a leading expert, scholar and writer on voting systems. He is co-editor of *Political Analysis*, a co-founding editor of the Political Science Network (a collection of on-line journals), sits on the editorial board of three leading academic political science journals—the *American Journal of Political Science, Electoral Studies*, and *Political Research Quarterly*—and has served as a referee of manuscripts for most of the major journals in his fields of research and as a fellow of the National Science Foundation. (ER0632-0643.)

[32] ER0619.

C. UNDER RESTRICTED IRV, THOUSANDS OF SAN FRANCISCO VOTERS WILL BE DEPRIVED OF THE RIGHT TO VOTE IN DISPOSITIVE ROUNDS OF FUTURE ELECTIONS, INCLUDING THE 2011 MAYORAL ELECTION.

If Restricted IRV remains in place, there is no question that voters will be barred from having any vote counted in decisive instant runoff rounds of future San Francisco elections, including the 2011 Mayoral election.[33]

There are already seven declared candidates for Mayor in 2011—including City Attorney Dennis Herrera and Supervisor Bevan Dufty—though the election is a year away.[34] Because it is an open seat (Mayor Newsom is term-limited), more candidates are almost certain to file for the office. Many prominent public figures have been publicly discussed as possible candidates for Mayor—such as state Senators Leland Yee and Mark Leno, and (assuming she is not elected Attorney General) District Attorney

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[33] Four of the five supervisorial elections on November 2, 2010, were decided in instant runoffs where votes were exhausted before the final round. The same was true of the Oakland Mayoral race, which had 10 candidates. The results from those elections are not yet final, but even the preliminary results illustrate the substantial impacts of Restricted IRV. San Francisco Supervisor District 10 was decided in the 19th round, by the end of which there were more exhausted votes than votes counted. Voters are submitting the unofficial results of those elections simultaneously herewith, and will submit the official results once they are available.

[34] *See* Candidate Statements of Intent (FPPC Form 501), available on the San Francisco Ethics Commission's website, http://www.sfethics.org/ (last visited Nov. 2, 2010).

Kamala Harris—and they are not among the seven already-declared candidates.[35]

Each Plaintiff/Voter is eligible to vote in City-wide municipal elections and plans to vote in the 2011 Mayoral election.[36] Each Voter wishes to rank all the candidates for Mayor, to avoid the risk of having their ballots exhausted.[37]

D. ALTERNATIVES TO RESTRICTED IRV ALREADY EXIST: CONSTITUTIONAL ELECTION SYSTEMS COULD EASILY BE IMPLEMENTED IN SAN FRANCISCO AND ARE CURRENTLY BEING USED BY THE CITY.

In the district court, the City submitted evidence that it is infeasible to operate an unrestricted instant runoff voting system where voters can rank all candidates. Tellingly, however, the City conceded that it could conduct non-IRV elections without any changes to its electoral equipment and protocols.[38] Indeed, the City Elections Department has done so historically for the municipal offices now subject to Restricted IRV, and does so now in elections for some municipal offices as well as all state and federal offices.[39]

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[35] ER0508, 0511-0513.
[36] ER0486, 0490, 0495, 0499, 0503, 0508.
[37] *Id*.
[38] ER0599, 0679.
[39] *Id*.

For the last half-century, San Francisco supervisors were elected at-large, by plurality vote.[40] In 2000, the City implemented district elections for supervisorial races, with a general election in November and a December runoff for races in which no candidate received a majority of the votes at the general.[41] Restricted IRV was first used in 2004.

City-wide offices for Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, and Public Defender were elected in a general/runoff system since the 1970s.[42] General elections for some of these offices were held in November and runoffs, if needed, in December; others were consolidated with the statewide primary in even-numbered years (usually in early June), with a November runoff if necessary.[43]

It is undisputed that the City's existing voting equipment and technology can be used to conduct plurality voting for City officials, or a general/runoff system, without any significant alterations or additional certifications by the Secretary of State.[44] Currently members of the San Francisco Board of Education and the Governing Board of the San

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[40] ER0397-0416, 0527-0527. There was a short-lived experiment with district elections and runoffs for the 1977 and 1979 supervisorial elections. (ER0413-0437.)

[41] This system was implemented under the terms of Proposition G, adopted in 1996. (ER0397-0412.)

[42] ER0417-0422.

[43] ER0417-0422, 0438-0443, 0527-0527.

[44] ER0599, 0679.

Francisco Community College District are elected using plurality voting, with no runoffs.[45] State and federal officials in San Francisco are elected with a June primary and a general election in November.[46]

VI.

SUMMARY OF ARGUMENT

By forcibly "exhausting" ballots, Restricted IRV regularly bars thousands of voters from having any vote counted at the critical juncture in San Francisco elections—the final, decisive instant runoff round in which the winning candidate is determined. This is plainly a severe burden on voting rights, and is subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1991) (hereafter "*Burdick*") (severe burdens on voting rights subject to strict scrutiny); *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (vote denial is a severe burden).

Alternatively, IRV (restricted or not) causes vote *dilution*, because some voters get more votes counted in "the election" than others—voters whose ranked candidates are eliminated in early instant runoff rounds are allowed to have up to three votes counted, whereas other voters can vote

[45] *Id*.
[46] ER0679.

only once. This, too, is a severe burden on voting, triggering strict scrutiny. *Id*.

The City has never attempted to argue that Restricted IRV could survive strict scrutiny. Nor could it, because Restricted IRV does not serve any compelling governmental interest and is not narrowly-drawn.

Instead, the City argued below that the burden on voting is not severe, and that strict scrutiny is inapplicable. That is wrong, but even if the burden on voting rights were not deemed severe, it is still significant, and Restricted IRV cannot stand. Under controlling Supreme Court case law, "non-severe" burdens on voting are still subject to close scrutiny in which courts must weigh the burden imposed on voting rights "against the precise interests put forward by the State as justifications for the burden imposed by its rule, *taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights*." *Burdick*, 504 U.S. at 434 (emphasis added).

The burdens imposed by Restricted IRV are not remotely necessary to serve the interests identified by the City, because readily-available voting alternatives would serve them as well (if not better) than Restricted IRV does. At the City's urging, the district court ignored those alternatives, but the failure to consider them was error.

The widespread disenfranchisement caused by the use of Restricted IRV also violates due process because such disenfranchisement is "fundamentally unfair." *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (violation of due process to disenfranchise 10% of voters by invalidating absentee ballots).

Finally, there can be no doubt that if Restricted IRV is unconstitutional the Voters are entitled to injunctive and declaratory relief. The City has never argued otherwise.

VII.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. Where, as here, there are no genuine disputes of material fact, the Court need only determine whether the district court correctly applied the substantive constitutional law. *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007); *Green v. City of Tucson*, 340 F.3d 891, 895 (9th Cir. 2003).

VIII.

ARGUMENT

A. RESTRICTED INSTANT RUNOFF VOTING VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

No right guaranteed by our Constitution is more precious than the right to vote. As the Supreme Court has declared, "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The principle of one person, one vote is fixed in the bedrock of our voting jurisprudence. It is black-letter law that every "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Restrictions on the right to vote are subject to challenge under the First Amendment (right of association) and the equal protection clause of the Fourteenth Amendment. *Burdick*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (hereafter "*Anderson*"); *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 188-89 (2008) (hereafter "*Crawford*"). The same "basic mode of analysis" is used for challenges under either of these provisions. *Partnoy v. Shelley*, 277 F. Supp. 2d 1064,

1072 (S.D. Cal. 2003) (quoting *LaRouche v. Fowler*, 152 F.3d 974, 987-88 (D.C. Cir. 1998)).

1. Strict Scrutiny Governs This Case.

The Supreme Court has expressly held that laws imposing a severe burden on voting rights are subject to strict scrutiny and must be narrowly-tailored to serve a compelling state interest. *See, e.g., Burdick*, 504 U.S. at 434.[47]

Following *Burdick*, this Circuit has repeatedly recognized that laws restricting an otherwise qualified voter from having a vote counted (*i.e.*, laws resulting in vote denial) and laws that result in the unequal weighting of votes (*i.e.*, laws resulting in vote dilution) impose a severe burden on the right to vote, and are subject to strict scrutiny. *Lemons*, 538 F.3d at 1104; *Green*, 340 F.3d at 899-900. *See also Dunn*, 405 U.S. at 330 (applying strict scrutiny to strike down state statute conditioning voter registration on one-year durational residency requirement); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-27 (1969) (citing *Reynolds*, 377 U.S. at 533); *ACLU v. Lomax*, 471 F.3d 1010 (9th Cir. 2006).

[47] *See also Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (applying strict scrutiny to strike down nomination petition requirements for minor-party and independent candidates).

The district court nevertheless declined to apply strict scrutiny, reading *Burdick* as supporting the conclusion that Restricted IRV does not impose a severe burden on the Voters' rights. That was error. In *Burdick*, the Court was faced with a challenge to Hawaii's ban on write-in voting. The plaintiff filed suit challenging that ban, contending that he had a right to cast a write-in vote for Donald Duck, and to have that vote counted. The Court held that this was not a severe burden for several reasons. First, the Court concluded that insistence on casting a write-in vote "amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system." 504 U.S. at 441. It held that "There are other means available, however, to voice such generalized dissension from the electoral process; and we discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws." *Id*. Moreover, the Court emphasized the ease with which legitimate candidates could gain access to the ballot, making the restriction on write-in votes a restriction only on those who were not reasonably diligent in complying with lenient filing deadlines. *Id*. at 436-37.

By contrast to the minimal burden imposed by the write-in ban in *Burdick*, the Voters are precluded from having a vote counted in the critical final instant runoff round for a candidate who is "actively participat[ing] in the system" and who—unlike Donald Duck—may actually be elected to govern the City of San Francisco.

a. Restricted IRV unconstitutionally *denies* substantial numbers of voters the right to have a vote counted in dispositive instant runoffs.

It is undisputed—indeed the City has *stipulated*—that Restricted IRV has denied thousands of voters the right to have a vote counted in decisive instant runoff elections.[48] This is vote denial, pure and simple. Restricted IRV places San Francisco voters in an untenable position. Faced with a multiplicity of candidates and the likelihood of multiple instant runoff rounds, the voter who wishes to actually have a say in the decisive instant runoff must guess as to which two candidates will survive to the final round of tabulation—no mean feat in many cases[49]—and use two of her three rankings to rank the final two guesstimated candidates accordingly. The penalty, should she guess wrong, is to have no vote counted in the final instant runoff which decides the winner; if the voter selects three

[48] ER0668-0670.

[49] ER0487, 0491, 0496, 0499-0500, 0504, 0508-0509, 0626-0627.

candidates who do not make it to the final instant runoff, she is denied the right to have her vote counted in that critical decisive round.

By its own terms, the San Francisco instant runoff system conducts a series of "runoff" elections, one right after the other.[50] It then proceeds, by virtue of the three-candidate limit, to arbitrarily and illegally *deny* some voters the right to have a vote counted in later, dispositive runoffs based upon the candidates they prefer in earlier rounds of voting. As the district court itself recognized, the constitutionality of San Francisco's Restricted IRV system is a question of first impression.[51]

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[50] S.F. CHARTER § 13.102 itself refers to this system as "Instant Runoff Voting."

[51] Slip Op. at 3 n.2. While three decisions from other states have upheld the constitutionality of *unrestricted* instant runoff voting, where the voter is allowed to rank every candidate on the ballot, none of those cases addressed Restricted IRV where a voter is limited to rank fewer candidates than are running for a particular office. *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009); *Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75-10166 AW (Mich. Cir. Ct. 1975), *available at* http://www.fairvote.org/library/statutes/legal/irv.htm (last visited Jan. 8, 2010); *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222 (Mass. 1941). *Stephenson* and *Moore* addressed systems in which voters' choices were unlimited—*i.e.*, unrestricted IRV. While the Minneapolis law does limit voters to ranking three candidates, that limitation was not an issue in the facial challenge decided by *Minnesota Voters Alliance* and was not addressed in the opinion.

Moreover, *Stephenson* is entitled to no weight as it is an unpublished trial court decision, and the continuing vitality of *Moore*, has been subsequently questioned by the very court that decided it—the Massachusetts Supreme Court. *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 14-15 (Mass. 1996). Finally, the decision in *Minnesota Voters*

i. Stripping away its hi-tech trappings, Instant Runoff Voting is the functional equivalent of a series of elections.

Instant Runoff Voting is the functional equivalent of a general election, followed by a series of instant runoff elections each of which is separately tabulated. Sophisticated computer technology and software permit the vote tabulations and re-tabulations to be done "instantly," but that does not alter the nature of the process itself. That instant runoff voting is the common-sense equivalent of a series of elections is recognized by, among others: (1) the chief proponents of instant runoff voting nationwide, FairVote.org, (2) the supporters of Proposition A in 2002, (3) the Minnesota Supreme Court, and (4) Dr. Jonathan Katz, plaintiffs' expert below, and a nationally-recognized voting expert.

FairVote's website, www.fairvote.org, repeatedly likens IRV to a "series of elections." Below are just a sample of those statements:

- "*IRV acts like a series of runoff elections* in which one candidate is eliminated *each election*. Each time a

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Alliance repeatedly emphasized that it was deciding only the *facial* constitutionality of an instant runoff voting system, and did not foreclose an as-applied challenge once the law was implemented and a factual record was established. San Francisco's IRV system has been implemented since 2004. The case at bench includes an as-applied challenge and a factual record.

candidate is eliminated, all voters get to choose among the remaining candidates."[52]

- "Q: Doesn't this give extra votes to supporters of defeated candidates?

  "A: No. In each round, every voter's ballot counts for exactly one candidate. In this respect, *it's just like a two-round runoff election*. . . . In IRV candidates get eliminated one at a time, and each time, all voters get to select among the remaining candidates. *At each step of the ballot counting, every voter has exactly one vote for a continuing candidate*. That's why courts have upheld the constitutionality of IRV."[53]

- "[A] series of runoffs are simulated . . . *just as if [voters] were voting in a traditional two-round runoff election* ..."[54]

This is also what San Francisco voters were told when they voted on Proposition A: the Supervisors who put Proposition A on the ballot and supported its adoption noted in their official ballot argument, mailed to all voters before the election: "The 'instant' runoff works much like December's 'delayed' runoff."[55]

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[52] FairVote.org, *New to IRV?: Frequently Asked Questions* at 2, *online at* http://www.fairvote.org/New-to-IRV (last visited Oct. 29, 2010) (emphasis added).

[53] *Id*. (emphasis added).

[54] FairVote.org, *How Instant Runoff Voting Works* at 1, *online at* http://www.fairvote.org/how-instant-runoff-voting-works (last visited Oct. 29, 2010) (emphasis added).

[55] ER0476. "Ballot summaries and arguments are accepted sources from which to ascertain the voters' intent and understanding of initiative measures[,]" *In re Lance W*., 37 Cal. 3d 873, 888 n.8 (1985). *See also Prete v. Bradbury*, 438 F.3d 949, 969 (9th Cir. 2006) (looking to voter pamphlet

That IRV is the functional equivalent of multiple elections was also recognized by the Supreme Court of Minnesota, which observed that instant runoff voting "is directly analogous to the pattern of voting in a primary/general election system." *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 690 (Minn. 2009) (hereafter "*Minnesota Voters Alliance*"). In language directly applicable here, the Minnesota Supreme Court stated that in an instant runoff system, the counting of ballots "simulates a series of runoff elections" *id.* at 686, and that "the effect in terms of the counting of votes is the same." *Id*. at 691. In fact, that functional equivalency was critical to the Court's holding that Minneapolis's IRV system was facially constitutional.

In *Minnesota Voters Alliance*, the plaintiffs alleged that IRV violated one-person, one-vote, because some voters—those who chose non-eliminated candidates—had only one vote counted, while "voters who cast their first-choice vote for the eliminated candidate get a second chance to influence the election by having their second-choice votes, for a different candidate, counted in the second round." *Id*. at 690. The Court, however, concluded that this mis-described the IRV system; rather than a single election in which voters are allowed to cast multiple ballots, the Court

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to determine proper interpretation of voter-adopted measure and its underlying purposes).

concluded that each instant runoff round was functionally a separate election, and thus every voter had one vote counted in each such election:

> **. . . IRV methodology is directly analogous to the pattern of voting in a primary/general election system**. In a nonpartisan primary election, each voter's vote counts in determining which two candidates survive to reach the general election. **In essence, those primary votes are the voters' first-choice ranking of the candidates. As a result of the primary, all but the top two candidates are eliminated. Then, in the general election, voters who voted for candidates eliminated in the primary are allowed to cast another ballot**, which necessarily will be for a different candidate—presumably, their second choice. This is no different than the counting of the second-choice votes of voters for eliminated candidates in instant runoff voting. **At the same time, in the general election, voters who voted in the primary for either of the two surviving candidates are allowed to vote again**, and they are most likely to vote again for their choice in the primary (unless, perhaps, they were voting strategically in the primary and did not vote for their actual first choice in an effort to advance a weaker opponent for their first choice to the general election). This is the equivalent of the continuing effect of the first-choice votes for continuing candidates in instant runoff. A vote in the general election still counts and affects the election, even though it is for the same candidate selected in the primary. **Appellants attempt to distinguish the primary/general election system on the basis that those elections are separate, independent events, but the effect in terms of the counting of votes is the same**.

766 N.W.2d at 690-91 (emphasis added).

And finally, the expert testimony of Dr. Katz reaffirms that instant runoff voting is the functional equivalent of a series of elections:

> That IRV is a series of elections is demonstrated in the first place by the fact that it is meant to replace—and essentially replicate—the functioning of a two-election system, with a general election in November and a runoff in December. Effectively, IRV simply asks the voters to plan ahead and commit to how they would vote in the second election. Then, if no candidate gets 50% in the first round, the voting machinery conducts that election automatically, without the need to have the voter return to the polling place.[56]

Dr. Katz further elaborates thus:

> In my view, an "election" would be described as a given set of voters choosing amongst a given set of candidates. Each time the voters and the candidates change, it constitutes a new "election." Because of the elimination of candidates by round, and the exhaustion of voters' ballots (voluntarily under unrestricted IRV, in many cases involuntarily under restricted IRV), each round would constitute a separate "election."[57]

That instant runoff voting is the functional equivalent of a series of elections is also consistent with the practical, functional analysis that the Supreme Court has prescribed for review of election regulations. As the Court has held, "[N]o litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious. . . . The rule is not self-executing and is no substitute for the hard judgments that must be made."

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[56] ER0629.

[57] *Id*. Also instructive is the use of ranked voting for overseas ballots in Alabama, Louisiana, and South Carolina. In those states, it is undisputed that "voters cast an absentee ballot before the primary election on which they rank their preferences for the office. That ballot is counted in the primary, and then counted again in the general election for the voter's most-preferred remaining candidate. Thus, they cast only one ballot, but unquestionably vote in more than one election in the process." *Id*.

Storer v. Brown, 415 U.S. 724, 730 (1972).[58] *See also People ex. rel. Devine v. Elkus*, 59 Cal. App. 396, 399 (1922) (striking down a version of proportional representation that permitted voters to cast four votes in a multi-candidate election at which nine city councilors would be elected because the court recognized that—as a functional matter—voters were participating in nine separate elections, even though as a formal matter they only cast one ballot).

ii. By denying some voters the ability to have a vote counted in the dispositive instant runoff election, Restricted IRV severely burdens the right to vote.

With this backdrop, there is no doubt that San Francisco's Restricted IRV system severely burdens the right to vote. The City's Charter expressly requires that a voter's "ballot shall be deemed 'exhausted,' ***and not counted*** in further stages of the tabulation, if all of the choices have been eliminated . . . ." S.F. CHARTER § 13.102(a)(3) (emphasis added). San Francisco's Director of Elections affirms this is how Restricted IRV operates

[58] A prime example of this functional approach to election regulations is *Terry v. Adams*, 345 U.S. 461, 475-77 (1953), in which the Court held that exclusion of blacks from a pre-primary election of the Jaybirds, a private political club whose candidate almost always secured the nomination of the Democratic Party, constituted state action and was unconstitutional.

in practice.[59] Since November 2004, tens of thousands of San Francisco voters have been denied the right to have a vote counted in decisive instant runoffs, after ranking the three candidates permitted, because their ballots have been "exhausted" due to Restricted IRV.

Consider, for example, an election under the City's previous system of a November general election and, if necessary, a December runoff, in which eight candidates sought a single office. There is no question that it would be a severe burden to deprive voters of the right to vote in the runoff because they voted for the sixth- or seventh- or eighth-place candidates in the November general election. As a functional matter, the system challenged at bench is no different—hence the name "instant runoff voting." Some voters (indeed thousands of them) are penalized for voting for the wrong (*i.e.,* less popular) candidates by being shut out of later instant runoffs. The burden is severe, and the constitutional violation obvious.

The constitutional violation is so manifest that there are few cases directly addressing situations where citizens are denied the right to vote in a duly-held election. One of these cases, *Ayers-Schaffner v. Distefano*, 37 F.3d 726 (1st Cir. 1994), is instructive here. In that case, a non-partisan primary election for school board was held at which three seats were up for

[59] ER0534-0540, 0554-0555.

election and voters were permitted to vote for two candidates. After the election, in response to protests by several of the candidates, the Rhode Island Board of Elections concluded that voters should have only been permitted to rank one candidate, and ordered a re-vote. The Board provided, however, that only those voters who had cast a ballot at the first, defective election could vote in the re-vote.

Several voters who were eligible to vote in the original election, but did not do so, filed suit challenging that restriction as a violation of their rights of free speech, association, equal protection, and due process. The trial court agreed and enjoined the Board of Elections from denying otherwise qualified voters the right to vote based on their failure to cast a ballot in the initial election. The Court of Appeal concurred, stating, "In its simplest form, this case asks us to decide whether a state may condition the right to vote in one election on whether that right was exercised in a preceding election. *So stated, the case is hardly worthy of discussion*." *Id*. at 727 (emphasis added). Applying strict scrutiny, the Court of Appeals affirmed the trial court's injunction.

Closer to home, in *Partnoy v. Shelley*, the federal district court enjoined California Elections Code § 11382, which would have prohibited any person from voting for a successor to Governor Gray Davis if he were

recalled, unless the voter had voted on the preliminary question whether Governor Davis should, in fact, be recalled. 277 F. Supp. 2d at 1064. Relying on *Ayers-Schaffner*, the court also applied strict scrutiny and ordered that all eligible voters be permitted to vote for Governor Davis's successor, regardless of whether they voted on the question of whether he should be recalled.

The burden on voting rights imposed by Restricted IRV is more severe than that in *Ayers-Schaffner* and *Partnoy*. Instead of "conditioning the right to vote in one election on *whether* that right was exercised in a preceding election[,]" *Ayers-Schaffner*, 37 F.3d at 727 (emphasis added), San Francisco's Restricted IRV conditions the right to have a ballot counted in a decisive instant runoff on *how* that right was exercised in a preceding runoff round. If anything, this is worse, for two reasons.

First, voters in those cases could *ensure* they would have a vote counted in the later election—by participating in the earlier election. San Francisco voters have no such guarantee; even if they wish to rank their three candidates to ensure participation in the final round, on the many occasions where numerous candidates vie for a particular office they must correctly guess who the top vote-getters will be, and they may guess wrong.

The fact that voters must guess correctly to have a vote counted in decisive instant runoffs makes Restricted IRV particularly burdensome.

Moreover, even if a voter were prescient enough to correctly predict who the top vote-getters would be, she would only be assured of having her vote counted in the decisive instant runoff round if she included them in her three ranked choices, even if she actually preferred other candidates. In other words, San Francisco voters are penalized based upon the *content* of their decision to rank one candidate over another; those who favor and vote for less popular candidates with their three rankings are penalized by being denied the right to have a vote even counted in decisive instant runoff rounds. The lawful "regulation of elections *does not* require voters to espouse positions that they do not support[.]" *Burdick*, 504 U.S. at 438 (emphasis in original). *See also Estill v. Cool*, 320 Fed. Appx. 309, 311 (6th Cir. 2008) (a voting regulation "is a severe burden and merits strict scrutiny *unless it is content neutral* . . . ." (emphasis added)), *cert. den.*, 129 S. Ct. 1988 (U.S. 2009).

The government cannot require citizens to vote the "right" way as a condition to having their vote counted. The very concept is anathema. By way of analogy, in *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996), a homeowner challenged Portland's

policy of offering discounted sewer connection rates to those homeowners who signed an irrevocable "consent" to annexation. Those who did not sign the "consent" were charged the full amount. This Court held that the "consents" amounted to votes in favor of annexation, while the refusal to sign was a vote against. Because homeowners who "voted" against annexation were penalized by paying higher rates—because "the subsidy is conditioned on how an elector votes"—the court concluded the policy placed an *especially* severe burden on voting and struck it down. *Id*. at 1266.

In this case, the burden is more severe; rather than a mere financial burden, San Francisco voters are penalized for "wrong" votes by being denied their fundamental right to have their vote counted in decisive runoff rounds.

b. Even if Instant Runoff Voting is characterized as a single election, strict scrutiny still applies because some voters' votes are *diluted* by the ability of other voters to have more votes counted.

The parties disagreed in the district court how best to characterize instant runoff voting. Adhering to the view of the Minnesota Supreme Court in *Minnesota Voters Alliance*, and other authorities on IRV, Voters contended (and still contend) that IRV is the functional equivalent of multiple elections, conducted seriatim. The City, however, argued that

instant runoff voting, regardless of the number of instant runoff rounds, was really a single election. The district court erroneously accepted this argument, and used it to conclude that Restricted IRV did not result in vote denial because every voter had a vote counted in early instant runoff rounds, and the fact that thousands of voters had no vote counted in later, decisive rounds was of no import because they are all part of "one election" in which all voters had a vote counted at one stage or another. *See, e.g.*, Slip Op. at pp. 14:11-17, 16:16-24.

There are several flaws in this reasoning.

First, depriving voters of the right to have a vote counted in the decisive runoff round is a severe burden no matter how IRV is characterized (*i.e.*, one person, *no* vote in the decisive instant runoff).

Second, the district court's conclusion that instant runoff voting is a single election ignores the functional workings of instant runoff voting, and conflicts with the reasoning of the Minnesota Supreme Court in *Minnesota Voters Alliance*.

Third, if IRV is viewed as a single election, then it results in the *dilution* of votes (*i.e.*, one person, *three* votes for some voters), and Restricted IRV is a "severe" burden on voting rights, subject to strict scrutiny.

"Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. . . . It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (quoting *Reynolds*, 377 U.S. at 555).

Vote dilution exists any time one voter's vote is given more weight than another's. "In determining whether an individual's vote has been diluted, 'the relevant inquiry is whether the vote of any citizen is approximately equal in weight to that of any other citizen, . . .' . . . In other words, the question is whether one person's vote counts the same as another's." *Turner v. Dierks Sch. Dist.*, 782 F. Supp. 81, 82 (W.D. Ark. 1992) (quoting *Bd. of Est. v. Morris*, 489 U.S. 688, 701 (1989) (internal quotation marks omitted)).

If IRV is viewed as a single election, some voters—those who vote for continuing candidates—only have one vote counted in "the election"; other voters, however, have votes counted for three different candidates, *i.e.*, "one person, *three* votes." The City admits this; it is integral to Restricted IRV. Consider the following example:

# of Voters in Bloc	Voters' Three Rankings (Restricted IRV)
8,000	ADC
9,000	BCD
3,500	CDE
2,000	DEA
1,000	EDC

In this case, the election would consist of three rounds, tabulated thus:

Candidate	Round 1	Round 2	Round 3
A	8,000	10,000	10,000
B	9,000	9,000	9,000
C	3,500	4,500	
D	2,000[60]		
E	1,000[60]		

In this scenario, the voters that preferred candidates A, B and C had only one vote counted. The voters ranking candidates D and E had three votes counted. Moreover, in this particular example, Candidate B—who had a plurality of first place votes in Round 1—is defeated because voters who supported Candidate D were allowed to have multiple votes counted, ultimately electing Candidate A, while Candidate B's voters were limited to a having a single vote counted.

In *Minnesota Voters Alliance* the plaintiffs contended that instant runoff voting is just one election, that some voters get to have multiple

[60] Two candidates would be eliminated in this first round pursuant to S.F. CHARTER § 13.102(e). *See* note 12, *supra*.

votes counted while others do not, and that IRV therefore unlawfully dilutes votes. 766 N.W.2d at 690-91. The Minnesota Supreme Court rejected this contention, *based on its conclusion that* "[e]very voter has the same opportunity to rank candidates when she casts her ballot, *and in each round every voter's vote carries the same value*." *Id.* at 693 (emphasis added).[61] That is not true of San Francisco's Restricted IRV system. Because of the three-candidate limit, some voters have a greater ability to influence the election by having a vote counted in the later, dispositive rounds of balloting, while other voters' ballots are discarded and "shall not be counted in further stages of the tabulation . . . ." S.F. CHARTER § 13.102(a)(3).

As the *Minnesota Voters Alliance* Court elaborated, "Under IRV, only one vote per voter can be counted in each round, just as in serial primary/general elections a voter may vote only once per election." *Id.* at 692. In other words, the Minnesota court's holding relied upon its view of instant runoff voting as consisting of multiple elections. Rejecting that characterization and treating IRV as a single election—as the district court

[61] Minneapolis restricts voters to three candidates, but that restriction was not addressed at all in the Minnesota Supreme Court's decision rejecting a facial constitutional challenge to IRV in *Minn. Voters Alliance*.

did below—undermines the constitutional underpinnings of all instant runoff voting systems, and subjects them to vote dilution claims.[62]

c. Restricted IRV fails strict scrutiny because it is not narrowly-tailored to serve a compelling state interest.

Because strict scrutiny applies, the City bears the burden of establishing that Restricted IRV is narrowly-tailored to fulfill a compelling state interest. *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007).

Defendants cannot remotely meet this burden.[63] No compelling interest justifies Restricted IRV. Indeed, the language of the First Circuit in *Ayers-Schaffner* is relevant here: "In a fresh election designed to determine which candidates are supported by a majority of the properly registered voters, *we cannot conceive of a governmental interest sufficiently strong to limit the right to vote to only a portion of the qualified electorate*." 37 F.3d at 731 (emphasis added). *See also Partnoy*, 277 F. Supp. 2d at 1078-79.

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[62] As noted by FairVote—the leading proponent of IRV nationally and an intervener in Minnesota Voters Alliance—"At each step of the ballot counting, every voter has exactly one vote for a continuing candidate. *That's why courts have upheld the constitutionality of IRV*." FairVote.org, *New to IRV?: Frequently Asked Questions, supra* note 52 (emphasis added).

[63] Tellingly, in its briefing below the City made *no effort* to show Restricted IRV could survive strict scrutiny.

Under San Francisco law, a ballot pamphlet was mailed to all voters at taxpayer expense prior to the March 2002 election on Proposition A. That pamphlet contained a ballot argument signed by the proponents of the measure, seven San Francisco supervisors, which identified four interests that would purportedly be served by instant runoff voting:

- Having municipal officers elected by a majority of the voters;
- Having municipal officers elected at a high-turnout election in November, rather than a low-turnout election in December;
- Reducing negative campaigning; and
- Reducing costs.[64]

Nothing in the Supervisors' argument, however, discussed the three-candidate limit or contended that these four interests would be served by Restricted IRV. Moreover, Defendant Arntz has admitted he did not even consider the first three of these interests in deciding to impose the three-candidate limit.[65] Thus, they cannot justify that decision *post hoc*.[66] But even were that not the case, careful consideration of those interests

[64] ER0476.

[65] ER0580-0585.

[66] The asserted government interests must have been considered *upon adoption*, rather than "hypothesized or invented post hoc in response to litigation." *United States v. Va.*, 518 U.S. 515, 533 (1996). *See also Green Party v. Garfield*, 648 F. Supp. 2d 298, 351 (D. Conn. 2009) (*post hoc* rationales insufficient to sustain voting burdens), *aff'd in part and rev'd in part on other grounds*, 616 F.3d 189 (2d Cir. 2010).

demonstrates they are inadequate to support the burden placed on San Francisco voters' voting rights.

i. Restricted IRV does not serve the interest in electing City officers by majority vote.

The Supervisors promised voters that if Proposition A passed, candidates would have to get a majority of votes cast to be elected, just like under the pre-existing general/runoff system. But far from serving this interest, Restricted IRV undermines it. As discussed in detail above, City officials are routinely elected with less than half of the total ballots cast. In fact, in 2008, all four of the supervisorial elections decided by Restricted IRV resulted in the winner garnering less than a majority of the total votes cast.[67]

The simple fact is that if the support of a "majority" were desired, unrestricted IRV or the pre-existing general/runoff system would serve that interest, but Restricted IRV does not.

ii. Restricted IRV does not serve the interest of having City officials elected when turnout is (supposedly) highest.

Proposition A's supporters also told voters that the measure would ensure City officials are elected in November, when—they claimed—turnout

[67] ER0335-0341.

was highest, rather than at allegedly low-turnout elections in December.[68] First, when December runoffs were held, turnout often went up in December.[69] Further, Restricted IRV itself does nothing to serve this interest because instant runoffs would still be held in November even if all candidates were ranked.

Moreover, this is an interest that can easily be served by a number of other voting systems. Straight plurality voting in November—the manner in which Supervisors were traditionally elected in San Francisco, and school officials are still elected—would have the same effect. Or the City could hold its general election in June and hold any runoffs in November to ensure a majority voting system. This is the manner in which the officials in every other county in California are elected (CAL. ELEC. CODE § 1300), and it is how the San Francisco public defender and assessor were elected from 1978 to 2001.[70]

[68] ER0476.
[69] ER0465-0469, 0582-0583.
[70] ER0417-0422, 0438-0443, 0527-0528.

iii. There is no record evidence that Restricted IRV reduces "negative campaigning," and that is not a legitimate interest anyway.

A third purpose identified by Proposition A's supporters was that IRV would reduce "negative campaigning."[71] There are several flaws with any attempt to claim this is a compelling interest justifying Restricted IRV.

First, there is no record evidence of negative campaigning in supervisorial district elections, which had only been implemented once before Proposition A was adopted (in 2000), and there is no record evidence that negative campaigning does not exist now under Restricted IRV.[72]

Second, this is not an interest served by the three-candidate restriction—if IRV does reduce negative campaigning, unlimited IRV would do just as well.

Finally, and most importantly, "suppressing negative political speech"—in other words, suppressing core political speech protected by the First Amendment—is not a "legitimate interest" that can justify restrictions on First and Fourteenth Amendment rights. *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1013-14 (9th Cir. 2003).

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[71] ER0476.

[72] ER0583-0584.

As the district court noted, the City has abandoned any reliance on this interest. *See* Slip Op. at p. 22:23-24.

iv. Reducing costs is not a compelling interest that justifies infringing voting rights.

Finally, the supporters of Proposition A argued to voters that doing away with a December runoff would save $2 million per election. Of course, the City spent millions to modify its election equipment to comply with Proposition A.[73] But leaving that fact aside, the case law is clear that "saving money is not an interest of sufficient importance to be classified as compelling or overriding." *In re Smith*, 323 F. Supp. 1082, 1088 (Bankr. D. Colo. 1971) (citing *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1965), which struck down poll taxes as unconstitutional).[74]

Finally, cost reductions could have been achieved by adopting plurality voting instead.[75]

v. Restricted IRV is not narrowly-tailored.

Because the interests underlying Restricted IRV are not compelling, the court need not consider whether it is narrowly-tailored to meet those

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[73] ER0593, 0595.

[74] *See also Tashjian v. Republican Party*, 479 U.S. 208, 217-18 (1986) (statute prohibiting party from allowing independent voters to vote in party primaries could not be justified by state's desire to avoid associated cost increases); *Fed. Elec. Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (administrative ease not a compelling state interest).

[75] ER0387, 0597-0599.

interests. *See, e.g.*, *Johnson v. Miller*, 929 F. Supp. 1529, 1560 (S.D. Ga. 1996) (three-judge court), *aff'd sub nom.*, *Abrams v. Johnson*, 521 U.S. 74 (1997). But even if it did, it is undisputable that other voting systems with long basis in San Francisco tradition—such as plurality voting, or June elections with a November runoff—would also serve the interests identified by the City without infringing the Voters' voting rights.

For example, plurality voting, in which the top vote-getter is elected without any runoff, would serve two of the four interests identified above just as well as, if not better than, Restricted IRV does: having City officials elected in November and reducing election costs. A third interest—suppressing core political speech—is illegitimate anyway. And the fourth interest—support by a majority of voters—is illusory under Restricted IRV; city officials are routinely elected without a true majority.

Alternatively, Proposition A indicated the voters' preference that a general/runoff system constitute the fall-back position in the event that IRV were unenforceable. S.F. CHARTER § 13.102(i). Moreover, the desire to have the dispositive election conducted in November rather than December could be fulfilled by having the general election in June and the runoff in

November—that is how officers in every other California county are elected. CAL. ELEC. CODE § 1300.[76]

Tellingly, the City made no effort to dispute the Voters' contentions on these points in the district court, effectively conceding them. Instead, the City asserted two *other* interests: (1) the need for stability, integrity and orderly election administration, arguing unrestricted IRV is not "feasible;" and (2) a desire to avoid voter confusion. These alternative interests do not justify Restricted IRV either.[77]

Other constitutional voting systems—for example, plurality voting—are just as stable and orderly as Restricted IRV, if not more so.[78] In fact, "most experts on voting systems recognize that one of the chief advantages

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[76] The district court invented an additional interest for Restricted IRV that the City never advanced—allowing voters to express their preferences in a more "nuanced" way. *See* Slip Op. at 26. First, the district court was limited to consideration of the interests identified *by the City*, rather than those it could imagine on its own. *Burdick*, 504 U.S. at 434. Second, this was not an interest advanced at the time IRV was enacted by the voters—it is a rationale "hypothesized or invented post hoc in response to litigation." *United States v. Va.*, 518 U.S. at 515. And most fundamentally, this purported interest is not a compelling interest justifying vote infringement and runs directly contrary to Supreme Court case law holding that the expressive function of voting has far less weight than the function of electing candidates. *See Burdick*, 504 U.S. at 438.

[77] *Post hoc* rationales cannot sustain the constitutionality of a law subject to strict or intermediate scrutiny. *See* note 66, *supra*. But ultimately the City's *post hoc* rationalizations fall short too.

[78] ER0255.

of plurality voting is that it is relatively quick and easy to administer."[79] The City made no effort to show otherwise below. And plurality elections are undeniably "feasible" because, as previously noted, San Francisco supervisors were elected using plurality voting for most of the past half century;[80] school board members and community college district board members are still elected that way;[81] and the City's Director of Elections has acknowledged that the City's current election machinery could be used to conduct plurality voting without any need for alterations or additional certifications.[82] Nor has the City disputed its cost-effectiveness.

The undisputed record also shows that plurality voting and general/runoff elections are less confusing to voters than IRV.[83]

The City's response to all this below was to urge that it could not feasibly implement unrestricted IRV, and to simply ignore the fact that other electoral systems would serve the interests the City advanced in support of its position without infringing the Voters' rights. The district court likewise ignored these readily-available alternatives.

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[79] *Id*.

[80] ER0397-0416, 0522-0525.

[81] ER0669.

[82] ER0599.

[83] ER0240 (restricted IRV appears to increase the rate of "over-votes"—a form of voter error—vis-à-vis the preceding general/runoff system), 0255-0256 (plurality voting less confusing than IRV).

There was no justification for turning a blind eye to alternative electoral systems that could serve the interests the City claimed were advanced by Restricted IRV. Indeed, consideration of such alternatives is an essential component of the analysis of the constitutionality of election restrictions; without considering available alternative electoral practices, a Court cannot know whether a challenged system is "narrowly-tailored" or whether there is a less-intrusive alternative. *See, e.g., Porter,* 496 F.3d at 1024 (striking down laws penalizing online "vote-swapping" between Nader and Gore supporters because "Under our case law, it was the Secretary's burden to show that the potential types of fraud the Secretary suggests might occur could not have been halted through measures less burdensome than the complete disabling of the websites' vote-swapping mechanisms.").

2. Restricted IRV Is Also Unconstitutional Under The Intermediate Level Of Scrutiny Prescribed By *Anderson v. Celebrezze*, *Burdick v. Takushi* And *Crawford v. Marion County*.

Even assuming, *arguendo,* that its burden on Voters' rights is not found to be "severe," and strict scrutiny is not applicable, Restricted IRV is still subject to a heightened level of constitutional scrutiny that it cannot survive.

The Supreme Court has prescribed the applicable standard of review for election law challenges in three key cases: *Anderson*, *Burdick*, and *Crawford*.

In *Anderson*, the Court rejected the view that strict scrutiny applies to every electoral regulation. Instead it held that constitutional challenges to election laws are subject to a flexible standard in which the reviewing court must judge the challenged regulation's constitutionality by weighing the burden it places on the plaintiffs' voting rights against the justifications put forth by the State in support of the challenged law, taking into account "the extent to which those interests make it *necessary* to burden the plaintiff's rights." 460 U.S. at 789 (emphasis added). The *Anderson* Court expressly cautioned, "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" *Id*. at 789-90 (quoting *Storer*, 415 U.S. at 730). Applying this standard, the Court struck down Ohio's early filing deadline for presidential candidates as unduly burdensome to independent candidates.

In *Burdick*, the Court elaborated on *Anderson*, by confirming that voting burdens which are deemed "severe" *are* subject to strict scrutiny, and must be narrowly-tailored to serve a compelling state interest, but that non-severe burdens are not subject to strict scrutiny. 504 U.S. at 434.

Rejecting the application of strict scrutiny to the challenged law before it, the Court upheld Hawaii's refusal to permit write-in votes, concluding that the burden imposed was minimal because the insistence on casting a write-in vote "amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system." *Id*. at 441.

Most recently, in 2008, the Supreme Court decided *Crawford*, clarifying the relationship between *Anderson* and *Burdick*. The *Crawford* Court held that if the burden on voting is "severe" it must apply strict scrutiny, but if it concludes that the voting burdens are not "severe" it is to apply the close scrutiny of *Anderson*'s balancing test. 533 U.S. at 189-90 (opinion of the Court.), 210 (Souter, J., dissenting), 237 (Breyer, J., dissenting).[84] Applying this standard the *Crawford* court rejected a facial

[84] Prior to *Crawford*, several courts had mistakenly interpreted *Burdick* as prescribing strict scrutiny for severe burdens and rational basis review for all "non-severe" burdens. *Crawford* confirmed that is not the case, however. The Second Circuit has explained the difference between rational basis review and the applicable standard under *Burdick* (as clarified by *Crawford*) thus: "Under *Burdick*'*s* 'flexible standard,' 504 U.S. at 434, the court must actually 'weigh' the burdens imposed on the plaintiff against 'the precise interests put forward by the State,' and the court must take 'into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.' [citation]." *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108-09 (2d Cir. 2008). At oral argument,

challenge to Indiana's requirement that voters present photo identification at the polling place to vote.

In summary, applying the *Anderson/Burdick/Crawford* standard requires a reviewing Court to:

- "[F]irst consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate[,]" and determine whether the burden is severe.
- If the burden is severe, apply strict scrutiny, determining whether the law is narrowly-tailored to serve a compelling state interest.
- If the burden is deemed not to be severe, the court must then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must

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even the City reluctantly acknowledged that the appropriate level of scrutiny is greater than rational basis review. (ER0061.) *See also ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008) (affirming trial court's refusal, under *Burdick* and *Crawford*, to apply rational basis review to a law requiring voters to present voter identification at the polls).

consider the extent to which those interests make it *necessary* to burden the plaintiff's rights."

- Having assessed the character, legitimacy and strength of the burdens on voters' rights and the justifications put forward by the State, the court must then weigh all these factors to determine the challenged law's constitutionality, determining whether the State's interest is "sufficiently weighty" to justify the limitation on the right to vote. The degree of judicial scrutiny increases as the severity of the burden rises.

Crawford, 533 U.S. at 189-90 (opinion of the Court), 210 (Souter, J., dissenting), 237 (Breyer, J., dissenting); *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789-90.

Applying the *Anderson/Burdick/Crawford* standard of review, San Francisco's Restricted IRV cannot survive, even if it is deemed to impose a "non-severe" burden on voting, thereby avoiding strict scrutiny.

The district court acknowledged that Restricted IRV "does exert some burden on voting rights." *See* Slip Op. at 28:6-7. That is putting it mildly. Thousands of voters are barred from having a vote counted in the decisive runoff rounds in which the municipal leaders are actually elected, relegated to the sidelines for the critical, determinative decision. As stated in Section

VIII.A.1 above, the Voters urge this is a severe burden, but even if this burden is not deemed "severe" enough to trigger strict scrutiny, it is significant.

That being the case, *the City* must identify interests that are "sufficiently weighty" to justify the considerable burdens placed on voting rights by Restricted IRV.[85] In assessing these interests, the Court must "tak[e] into consideration the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (emphasis added). In fact, however, the implementation of Restricted IRV is not remotely necessary to serve the City's identified interests.

As discussed in Section VIII.A.1.c above, the ballot materials supporting Proposition A identified four interests that purportedly justified the use of IRV: having municipal officers elected by a majority of voters; having municipal officers elected at high-turnout November elections, rather than low-turnout December elections; reducing negative campaigning; and reducing costs. In the district court, the City identified two additional interests in support of Restricted IRV: (1) the need for stability, integrity and orderly election administration, arguing unrestricted IRV is not "feasible;" and (2) a desire to avoid voter confusion.

[85] *Burdick*, 504 U.S. at 434 (court must weigh the burden "against the precise interests put forward by the State. . . .").

As discussed in some detail above, the un-contradicted record evidence establishes Restricted IRV is not "necessary" to serve any legitimate interests that the City identified:

- The interest in suppressing "negative" campaign speech is not even legitimate, *see Ariz. Right to Life PAC*, 320 F.3d at 1013-14, much less weighty enough to justify the burden on the Voters' rights, and the City has abandoned this justification. *See* Slip Op. at p. 22:23-24.
- The three-candidate limit renders the interest in having municipal officers elected by a majority of the voters entirely illusory.[86] Moreover, this interest can be served just as well by other electoral systems, such as the traditional general/runoff system, which the City administered prior to the adoption of IRV, and which the voters identified as their preferred back-up to IRV, *see* S.F. CHARTER § 13.102(i).
- And, as discussed above, the Voters introduced undisputed evidence that the other interests (saving costs, having officers elected at high-turnout November elections, providing for stable, orderly elections, and preventing voter confusion), are

[86] *See* notes 26-30 and 67, *supra*, and accompanying text.

> all served just as well, if not better, by other voting systems that do not violate the Voters' voting rights—notably, plurality voting, which was used for supervisorial elections prior to 2000 and which is still used for some City offices, and general/election runoff voting, which San Francisco's voters identified as their preferred alternative in the event IRV is not implemented—as by Restricted IRV.[87]

The City *never disputed* any of the foregoing. Instead, it simply argued that *un*restricted IRV is impossible to implement and urged the district court to ignore the availability of alternative systems that would serve the City's interests equally well. By taking this blinkered approach, the City presented the district court with a false choice between only Restricted IRV and unrestricted IRV, implying that if the latter cannot be implemented the use of the former must be acceptable.

Unfortunately, the district court accepted the City's false dichotomy without explanation, and did not discuss, or weigh, the availability of alternative systems. This was error. Unless a court considers the alternatives to a challenged electoral practice, it can never know whether that practice is "necessary" to serve the interests advanced by the City.

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[87] ER0240, 0255-0256, 0387, 0397-0422, 0438-0443, 0465-0469, 0522-0528, 0582-0583, 0597-0599, 0669.

For example, in *Lubin v. Panish*, 415 U.S. 709 (1974), the Supreme Court struck down California's requirement that candidates pay a substantial filing fee to run for office. The Court conceded that the interest identified by the State in support of the requirement—limiting access to the ballot to "serious" candidates to keep the ballot "manageable"—was indeed a "legitimate state interest." *Id*. at 716. It held, however, that the filing-fee requirement was not "reasonably necessary" to serve that interest, and observed:

> In so holding, we note that there are obvious and well-known means of testing the "seriousness" of a candidacy which do not measure the probability of attracting significant voter support solely by the neutral fact of payment of a filing fee.

Id. at 718-19 (discussing alternatives).

As *Lubin* illustrates, an assessment of whether the interests identified by the City make it "necessary" to burden the Voters' rights by imposing Restricted IRV requires consideration of plausible alternatives. By completely refusing to submit evidence that alternative systems would not serve its interests, or even address the alternatives raised by the Voters, the City has failed to meet the *Anderson/Crawford/Burdick* test and Restricted IRV cannot stand.

B. RESTRICTED IRV VIOLATES DUE PROCESS.

"A state election violates due process 'if it is conducted in a manner that is fundamentally unfair.'" *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1058 (9th Cir. 2000) (quoting *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998)). *See also Caruso v. Yamhill County*, 422 F.3d 848, 863 (9th Cir. 2005), *cert. denied sub nom., Caruso v. Oregon*, 126 S. Ct. 1786 (2006); *Duncan v. Poythress*, 657 F.2d 691, 702-03 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982).

The courts have recognized that widespread disenfranchisement of voters constitutes fundamental unfairness. For example, in *Duncan v. Poythress*, the Fifth Circuit upheld a district court ruling that state officials' refusal to call a special election in violation of state law to fill a position on the Georgia Supreme Court violated the electors' due process rights. *See* 657 F.2d at 708. And in *Bonas v. Town of N. Smithfield*, 265 F.3d 69 (1st Cir. 2001), the First Circuit held that it was fundamentally unfair of town officials to cancel the City's 2001 municipal elections when a newly-enacted charter amendment provided that City elections would take place in even-numbered years beginning in 2002.

Other cases have reached the same conclusion with respect to disenfranchisement of part of the electorate as is the case here. For

example, the ruling in *Ayers-Schaffner* was partially premised on due process; in support of its ruling it cited *Griffin v. Burns*, in which the First Circuit found fundamental unfairness in a state Supreme Court's post-election invalidation of absentee ballots comprising 10% of the votes cast. 570 F.2d at 1078-79. The percentage of San Francisco voters who rank three different candidates and yet are deprived of the ability to have a vote counted in the dispositive round often exceeds 10%.[88]

Similarly, in *League of Women Voters v. Brunner*, 548 F.3d 463 (6th Cir. 2008), the Sixth Circuit found that plaintiffs sufficiently stated a claim for violation of due process where they alleged that Ohio's non-uniform rules and procedures at polling places threatened widespread and arbitrary disenfranchisement of voters. *See also Reynolds*, 377 U.S. at 555.

And the Supreme Court, in *Bush v. Gore*, 531 U.S. at 98, enjoined a statewide recount in which a ballot might be counted in one county that would be rejected in another county as violating due process.

Likewise in this case, San Francisco's Restricted IRV system has disenfranchised and threatens future disenfranchisement of a substantial portion of the electorate in decisive runoff rounds.

[88] ER0650.

C. THE VOTERS ARE ENTITLED TO A PERMANENT INJUNCTION AND DECLARATORY JUDGMENT AGAINST THE CONTINUED USE OF RESTRICTED IRV.

"[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006). Applying these equitable principles the Supreme Court has held that once it is shown a governmental body's electoral system is unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds*, 377 U.S. at 585.[89]

Courts have widely held that, "Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury." *Cardona v.*

[89] Because a declaratory judgment lacks the coercive effect of an injunction, the Supreme Court has held that a party seeking declaratory relief need not meet these "traditional equitable prerequisites" to obtain it. *Steffel v. Thompson*, 415 U.S. 452, 466-67, 472 (1972) (plaintiff need not show irreparable injury to get a declaration). *See also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010).

Oakland Unif. Sch. Dist., 785 F. Supp. 837, 840 (N.D. Cal. 1992). *See also Reynolds*, 377 U.S. at 562 (the right to vote is "'a fundamental political right, because [it] is preservative of all rights'"). They have also held that, "There is a strong public interest in allowing every registered voter to vote." *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). And finally, the harm to Defendants of an injunction would be minimal. Plaintiffs' request for injunctive relief gives Defendants an option: the City may implement unrestricted IRV in which voters can rank every candidate, *or* it may implement another constitutional voting system such as plurality voting or a traditional general/runoff system like that used prior to the adoption of Proposition A. The City's existing voting machines are already used for primary/general (or general/runoff) elections for state and federal offices, and for plurality voting for school board and community college board.[90] The machines would need no alterations or additional certifications for use in the same manner for municipal offices.[91]

[90] ER0679.
[91] ER0599.

IX.

CONCLUSION

The district court's judgment for the City should be reversed and the case remanded for entry of judgment in the Voters' favor, enjoining the continued use of Restricted IRV.

Respectfully submitted,

Dated: November 8, 2010

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

By: _____
James R. Parrinello

By: _____
Christopher E. Skinnell

Attorneys for Plaintiff/Appellants

STATEMENT RE RELATED CASES

9TH CIRCUIT RULE 28-2.6

Appellants know of no other related case pending in this Court.

Dated: November 8, 2010 NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR, LLP

By:_____
Christopher E. Skinnell

Attorneys for Plaintiff/Appellants

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Attorney for Plaintiff/Appellants Ron Dudum, et al.

Date Nov 8, 2010

9th Circuit Case Number(s) 10-17198

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***Dudum v. Arntz*, Case No. 10-17198**
Appellants' Opening Brief
EXHIBIT A

SEC. 13.102. - INSTANT RUNOFF ELECTIONS.

(a) For the purposes of this section: (1) a candidate shall be deemed "continuing" if the candidate has not been eliminated; (2) a ballot shall be deemed "continuing" if it is not exhausted; and (3) a ballot shall be deemed "exhausted," and not counted in further stages of the tabulation, if all of the choices have been eliminated or there are no more choices indicated on the ballot. If a ranked-choice ballot gives equal rank to two or more candidates, the ballot shall be declared exhausted when such multiple rankings are reached. If a voter casts a ranked-choice ballot but skips a rank, the voter's vote shall be transferred to that voter's next ranked choice.

(b) The Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors shall be elected using a ranked-choice, or "instant runoff," ballot. The ballot shall allow voters to rank a number of choices in order of preference equal to the total number of candidates for each office; provided, however, if the voting system, vote tabulation system or similar or related equipment used by the City and County cannot feasibly accommodate choices equal to the total number of candidates running for each office, then the Director of Elections may limit the number of choices a voter may rank to no fewer than three. The ballot shall in no way interfere with a voter's ability to cast a vote for a write-in candidate.

(c) If a candidate receives a majority of the first choices, that candidate shall be declared elected. If no candidate receives a majority, the candidate who received the fewest first choices shall be eliminated and each vote cast for that candidate shall be transferred to the next ranked candidate on that voter's ballot. If, after this transfer of votes, any candidate has a majority of the votes from the continuing ballots, that candidate shall be declared elected.

(d) If no candidate receives a majority of votes from the continuing ballots after a candidate has been eliminated and his or her votes have been transferred to the next-ranked candidate, the continuing candidate with the fewest votes from the continuing ballots shall be eliminated. All votes cast for that candidate shall be transferred to the next-ranked continuing candidate on each voter's ballot. This process of eliminating candidates and transferring their votes to the next-ranked continuing candidates shall be repeated until a candidate receives a majority of the votes from the continuing ballots.

(e) If the total number of votes of the two or more candidates credited with the lowest number of votes is less than the number of votes credited to the candidate with the next highest number of votes, those candidates with the lowest number of votes shall be eliminated simultaneously and their votes transferred to the next-ranked continuing candidate on each ballot in a single counting operation.

(f) A tie between two or more candidates shall be resolved in accordance with State law.

(g) The Department of Elections shall conduct a voter education campaign to familiarize voters with the ranked-choice or, "instant runoff," method of voting.

(h) Any voting system, vote tabulation system, or similar or related equipment acquired by the City and County shall have the capability to accommodate this system of ranked-choice, or "instant runoff," balloting.

(i) Ranked choice, or "instant runoff," balloting shall be used for the general municipal election in November 2002 and all subsequent elections. If the Director of Elections certifies to the Board of Supervisors and the Mayor no later than July 1, 2002 that the Department will not be ready to implement ranked-choice balloting in November 2002, then the City shall begin using ranked-choice, or "instant runoff," balloting at the November 2003 general municipal election.

If ranked-choice, or "instant runoff," balloting is not used in November of 2002, and no candidate for any elective office of the City and County, except the Board of Education and the Governing Board of the Community College District, receives a majority of the votes cast at an election for such office, the two candidates receiving the most votes shall qualify to have their names placed on the ballot for a runoff election held on the second Tuesday in December of 2002.

(Added March 2002) (Former Section 13.102 added November 1996; repealed March 2002)